

Message Text

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TRSE-00 SS-15 STR-04 OMB-01 CEA-01 CIAE-00 COME-00

FRB-03 INR-07 NSAE-00 XMB-02 OPIC-03 LAB-04 SIL-01

DODE-00 PM-04 H-02 PA-01 PRS-01 NSCE-00 SSO-00

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TO ALL DIPLOMATIC POSTS IMMEDIATE

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FOR AMB MYERSON/GENEVA - NON ECOSOC POSTS FOR INFO

E.O. 11652: GDS

TAGS: PGOV, PFOR, UN, ECOSOC

SUBJECT: 61ST ECOSOC: U.S. PROPOSAL ON ILLICIT PAYMENTS

REF: 151183

1. REPORTS FROM GENEVA AND CAPITALS INDICATE THERE IS
SUBSTANTIAL AGREEMENT DEVELOPING IN ECOSOC TO ESTABLISH
A WORKING GROUP TO CONSIDER THE ILLICIT PAYMENTS PROBLEM.
HOWEVER, THESE REPORTS ALSO INDICATE THAT SUPPORT WHICH HAS
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BEEN EXPRESSED FOR U.S. DRAFT RESOLUTION IN MANY QUARTERS
IS SOFT AND THAT SIGNIFICANT TREND MAY BE DEVELOPING AMONG
CERTAIN KEY DC'S AND LDC'S TO SUBSTITUTE A GENERAL STUDY
OF CORRUPT PRACTICES FOR THE DRAFTING OF AN INTERNATIONAL

AGREEMENT TO CONTROL ILLICIT PAYMENTS AS PROPOSED BY THE U.S. WE ARE VERY MUCH CONCERNED THAT THIS PROPOSAL, IF ACCEPTED, WOULD POSTPONE FOR MANY YEARS, IF NOT INDEFINITELY THE EFFECTIVE INTERNATIONAL ACTION REQUIRED TO DEAL WITH ILLICIT PAYMENTS WHILE AT THE SAME TIME ESTABLISHING A MECHANISM WITH AN OPEN-ENDED MANDATE WHICH COULD BE USED

FOR POLITICAL ATTACKS AGAINST TNC'S AND THE FREE ENTERPRISE SYSTEM FOR YEARS TO COME. IN VIEW OF THE HIGH PRIORITY PLACED ON THIS INITIATIVE BY THE PRESIDENT, AND THE SUBSTANTIVE DANGERS OF A STUDY APPROACH, THE USG IS NOT PREPARED TO ACCEPT THIS MODIFICATION OF ITS INITIATIVE. WE BELIEVE THAT GOVERNMENTS SHOULD HAVE THE OPPORTUNITY AT ECOSOC TO DECLARE WHETHER OR NOT THEY ARE PREPARED TO WORK NOW FOR EFFECTIVE INTERNATIONAL ACTION TO DEAL WITH ILLICIT PAYMENTS. REQUEST ALL ACTION POSTS TO TAKE THIS ISSUE UP WITH HOST GOVERNMENT AT HIGHEST POLITICAL LEVEL PRACTICAL ASAP. YOU SHOULD DRAW ON FOLLOWING TALKING POINTS BUT MAY ADJUST THEM TO MAKE MAXIMUM APPEAL TO HOST GOVERNMENT. ITEM WILL BE VOTED ON NEXT WEEK, BUT CRITICAL DECISIONS MAY WELL BE TAKEN BEFORE THE WEEK-END. TIME IS OF THE ESSENCE.

2. TALKING POINTS: (A) OVER PAST YEAR INTERNATIONAL COMMUNITY HAS BEEN JOLTED BY REPORTS OF BRIBERY AND OTHER QUESTIONABLE PAYMENTS INVOLVING CORPORATIONS AND GOVERNMENT OFFICIALS IN SUBSTANTIAL NUMBER OF COUNTRIES, BOTH DEVELOPED AND DEVELOPING. THESE REPORTS HAVE CAUSED DEEP PUBLIC CONCERN IN MANY COUNTRIES, AND HAVE AFFECTED PUBLIC CONFIDENCE IN BOTH GOVERNMENTS AND IN ENTERPRISES ENGAGED IN INTERNATIONAL TRADE AND INVESTMENT. THERE IS WIDE-SPREAD PUBLIC DEMAND FOR EFFECTIVE ACTION TO CONTROL ILLICIT PAYMENTS WHICH HAS BEEN SUPPORTED BY INTERNATIONAL COMMUNITY AS REFLECTED IN UNGA RESOLUTION 3514.

(B) WHILE EVERYONE RECOGNIZES THAT PRIMARY RESPONSIBILITY FOR CONTROLLING BRIBERY RESTS WITH HOST (IMPORTING) GOVERNMENT
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MENTS, DEVELOPING COUNTRIES PARTICULARLY HAVE EMPHASIZED THE NEED FOR COOPERATION OF HOME (EXPORTING) COUNTRIES TO DEAL WITH THE ISSUE. UNGA RES. 3514 APPEALS FOR SUCH COOPERATION. USG AT AN EARLY DATE RECOGNIZED ITS RESPONSIBILITIES IN THIS REGARD AND HAS TAKEN SUBSTANTIAL ACTION THROUGH ITS ADMINISTRATIVE AGENCIES SUCH AS THE SEC AND IRS TO DETER SUCH PRACTICES BY US ENTERPRISES BY REQUIRING FULL DISCLOSURE OF ILLICIT PAYMENTS. IN ADDITION, US CONGRESS HAS ENACTED NEW LEGISLATION REQUIRING COMPREHENSIVE DISCLOSURE OF COMMISSIONS AND OTHER PAYMENTS MADE IN CONNECTION WITH MILITARY SALES. FINALLY, PRESIDENT FORD HAS ANNOUNCED HIS INTENTION TO ASK CONGRESS FOR ADDITIONAL LEGISLATION TO ENHANCE THE DETERRENT EFFECT

OF US LAW.

(C) THUS, USG IS DOING ITS PART AND IS PREPARED TO DO MORE. HOWEVER, IT IS OBVIOUS THAT PROBLEM CANNOT BE CONTROLLED BY ONE COUNTRY ALONE. EFFECTIVE INTERNATIONAL COOPERATION IS NECESSARY. WE ARE CONVINCED THAT AN INTERNATIONAL AGREEMENT IS ESSENTIAL TO ESTABLISH AN AGREED FRAMEWORK FOR INTERNATIONAL COOPERATION THAT WILL FACILITATE EFFECTIVE COOPERATION AND AVOID PROBLEMS THAT CAN ARISE FROM UNILATERAL ACTIONS BY ANY STATE.

(D) THE USG HAS CONSIDERED THIS MATTER VERY CAREFULLY AND WE ARE CONVINCED THAT BUSINESS CANNOT GO ON AS USUAL AND THAT INTERNATIONAL COMMUNITY HAS AN UNIQUE OPPORTUNITY TO MAKE MEANINGFUL CHANGE IN LONG-ESTABLISHED PRACTICES IF WE ESTABLISH REALISTIC GOALS AND EFFECTIVE PROCEDURES. AS WE ARE DEALING WITH PRACTICES WHICH ARE RECOGNIZED AS CRIMINAL UNDER THE LAWS OF NEARLY ALL COUNTRIES OF THE WORLD, IT IS CLEAR THAT WE MUST RELY ON NATIONAL LEGISLATION TO DEFINE THE OFFENSES AND TO ESTABLISH THE REQUISITE PROCEDURAL SAFEGUARDS. HOWEVER, A BINDING INTERNATIONAL AGREEMENT IS ESSENTIAL TO ESTABLISH A LEGAL BASIS FOR EXCHANGE OF INFORMATION AND OTHER COOPERATION IN THE ENFORCEMENT OF CRIMINAL LAWS. FURTHER, AN INTERNATIONAL AGREEMENT COULD BE EXTREMELY USEFUL IN ESTABLISHING AN INTERNATIONAL CONSENSUS ON SUCH QUESTIONS AS USE OF AGENTS IN GOVERNMENT PROCUREMENT AND THE DISCLOSURE OF PAYMENTS IN CONNECTION WITH DEFINED TRANSACTIONS
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INVOLVING GOVERNMENTS. THERE IS LITTLE NATIONAL LEGISLATION ON THESE ASPECTS. IT SHOULD BE MADE CLEAR THAT THE U.S. HAS NO INTENTION OF DRAFTING INTERNATIONAL CRIMINAL LAW ALTHOUGH WE SEE GREAT MERIT IN A UNIFORM APPROACH TO DISCLOSURE. ON THE OTHER HAND, IT IS IMPOSSIBLE TO HAVE STATE COOPERATION ON CRIMINAL MATTERS ON ANY BASIS OTHER THAN NATIONAL LEGISLATION AND INTERNATIONAL AGREEMENTS.

(E) USG UNDERSTANDS THAT SOME COUNTRIES ARE HESITANT TO ENDORSE CONCEPT OF AN INTERNATIONAL AGREEMENT AT THIS TIME AND MAY PREFER TO STUDY THE ISSUES DURING THE NEXT YEAR RATHER THAN BEGINNING TO TAKE ACTION ON THE PROBLEM. WHILE US AGREES THAT ECOSOC RESOLUTION SHOULD NOT PREJUDGE SUBSTANTIVE CONTENT OF AN INTERNATIONAL AGREEMENT, AND THAT THE DRAFTING GROUP SHOULD BE PREPARED TO CONSIDER ALL OPTIONS, WE ARE ALSO CONVINCED THAT A PROPOSAL TO STUDY THE ISSUES WOULD BE CORRECTLY PERCEIVED BY PUBLIC OPINION EVERYWHERE AS A SUBSTITUTE FOR MEANINGFUL ACTION. FURTHER, WE DO NOT BELIEVE THERE IS ANY REASON TO ENGAGE IN A STUDY OF NATIONAL LEGISLATION IN THIS FIELD. THE US HAS CONDUCTED A SURVEY OF LAWS OF VARIOUS COUNTRIES. WE HAVE FOUND THAT NEARLY EVERY COUNTRY HAS LEGISLATION

IN ONE FORM OR OTHER PROHIBITING BRIBERY OF GOVERNMENT OFFICIALS. WE DO NOT BELIEVE IT WOULD BE FEASIBLE OR NECESSARY TO TRY TO HARMONIZE THESE LAWS. US CANNOT HELP BUT REGARD A PROPOSAL TO STUDY THE ISSUES AS AN EFFORT TO DEFEAT THE US PROPOSAL FOR AN INTERNATIONAL AGREEMENT. THE US HAS TAKEN SERIOUSLY THE APPEAL OF THE UNGA FOR EFFEC-TIVE INTERNATIONAL ACTION AND PRESIDENT FORD HAS PERSONALLY ENDORSED AN INTERNATIONAL AGREEMENT AS A MATTER OF HIGH PRIORITY. THE US EXPECTS TO PRESS THIS PROPOSAL FOR AN INTERNATIONAL AGREEMENT AND WOULD ANTICIPATE THE SUPPORT OF ALL COUNTRIES THAT ARE PREPARED TO MAKE A NATIONAL COMMITMENT TO DEAL WITH THE PROBLEM OF ILLICIT PAYMENTS IN INTERNATIONAL TRADE AND INVESTMENT. SPECIFIC CONTENTS OF AGREEMENT WILL BE PRODUCT OF NEGOTIATION AND US IS PREPARED FOR SUBSTANTIAL GIVE AND TAKE.

(F) FOR LDC'S: THE US SEES NO CONFLICT BETWEEN AN INTERNATIONAL AGREEMENT ON ILLICIT PAYMENTS AND MORE COMPREHENSIVE WORK TO BE CARRIED ON IN THE UN PERMANENT CONFIDENTIAL

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COMMISSION ON TNC'S RESPECTING A CODE OF CONDUCT. THE US IS PREPARED TO PARTICIPATE ACTIVELY IN THAT WORK AND IT WOULD HAVE NO OBJECTION TO APPROPRIATE REFERENCE TO THAT EFFECT IN PREAMBLE TO RESOLUTION ON ILLICIT PAYMENTS. WE HAVE PROPOSED THAT SEPARATE WORKING GROUP ON ILLICIT PAYMENTS BE ESTABLISHED UNDER ECOSOC PRECISELY BECAUSE THE MEMBERS OF TNC COMMISSION CONSIDERED THAT COMMISSION'S MANDATE WAS NOT BROAD ENOUGH TO INCLUDE TRADE WHILE RECOGNIZING THAT THE MOST SENSATIONAL CASES OF ILLICIT PAYMENTS HAVE INVOLVED INTERNATIONAL TRADE WITH GOVERNMENTS.

(G) FOR DC'S: THE US DOES NOT REGARD OUR PROPOSAL FOR A BINDING AGREEMENT ON ILLICIT PAYMENTS AS IN ANY WAY INCONSISTENT WITH OUR POSITION THAT A GENERAL CODE OF CONDUCT FOR TNC'S MUST BE VOLUNTARY. THE US AND OTHER DC'S HAVE CONSISTENTLY TAKEN THE VIEW THAT BINDING AGREEMENTS ARE APPROPRIATE FOR NARROWLY DEFINED SUBJECTS WHICH ARE REGULATED BY NATIONAL LAW WHERE THERE IS AN ADEQUATE BASIS FOR INTERNATIONAL AGREEMENT. CODES OF CONDUCT, HOWEVER, WHICH PURPORT TO DEAL WITH TNC'S AS A SEPARATE CATEGORY IN GENERAL TERMS COVERING A BROAD RANGE OF DIFFERENT MATTERS WHERE THERE IS VERY LITTLE REAL CONSENSUS ON DETAIL CANNOT BE MADE THE SUBJECT OF BINDING INTERNATIONAL AGREEMENT PRECISELY BECAUSE THEY ARE NOT TRANS-LATABLE INTO NATIONAL LEGISLATION ACCEPTABLE TO OUR GOVERNMENTS. MOVEMENT TOWARD BINDING AGREEMENT ON A SPECIALIZED MATTER SUCH AS ILLICIT PAYMENTS WHILE WORK ON A VOLUNTARY GENERAL CODE CONTINUED WOULD UNDERLINE THE DISTINCTION TO GREAT BENEFIT OF WEO POSITION.

(H) IF HOST GOVERNMENT QUESTIONS "NARROW" SCOPE OF

AGREEMENT PROPOSED BY US, YOU SHOULD INDICATE THAT US DOES NOT BELIEVE IT FEASIBLE AT THIS STAGE TO DEAL ON INTERNATIONAL PLANE WITH TRANSACTIONS SOLELY BETWEEN PRIVATE PARTIES. IF WE ARE TO MAKE ANY DEFINITE PROGRESS ON THESE ISSUES IN SHORT TERM, WE CANNOT EXPECT TO DEAL WITH SUCH A BROAD UNIVERSE. MANY COUNTRIES ARE HESITANT TO MAKE COMMITMENTS IN THIS FIELD AND IT WOULD BE NEARLY IMPOSSIBLE TO OBTAIN WIDE SUPPORT FOR AN AGREEMENT OF SUCH COMPREHENSIVE SCOPE. DEALING WITH ROUTINE COMMERCIAL TRANSACTIONS WOULD ENGAGE INTERNATIONAL COMMUNITY TOO DEEPLY

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IN INTERNAL AFFAIRS OF STATES. ALSO, IF PURELY PRIVATE TRANSACTIONS WERE INCLUDED, THERE WOULD BE CONSIDERABLE INTEREST IN US AND ELSEWHERE TO ENCOMPASS DOMESTIC TRANSACTIONS COMPETING WITH INTERNATIONAL TRADE.

(I) FOR DC'S: IN THOSE CAPITALS, SUCH AS LONDON, WHERE IT IS APPROPRIATE TO TALK FRANKLY OF COMPETITIVE EFFECTS OF REGULATION OF FOREIGN PAYMENTS, YOU SHOULD NOTE THAT US IS DETERMINED TO TAKE MEASURES TO RESTRAIN THE ACTIVITIES OF US ENTERPRISES THAT MAY HAVE ERRED AND THAT US SENATE LAST NOVEMBER UNANIMOUSLY (93-0) ADOPTED A RESOLUTION CALLING ON USG TO NEGOTIATE BINDING INTERNATIONAL AGREEMENT IN MTN AND OTHER INTERNATIONAL FORA. USG AND ITS TRADING PARTNERS CANNOT PRUDENTLY IGNORE THIS ADMONITION. IF WE CANNOT MAKE PROGRESS IN ECOSOC, THE ISSUE IN THE MTN IS GOING TO BE MUCH MORE DIFFICULT.

3. ACCORDING TO BEST CURRENT INFORMATION, US PROPOSAL HAS STRONG SUPPORT OF FOLLOWING COUNTRIES: ITALY, NETHERLANDS, NORWAY, SWEDEN, BOLIVIA, AND EQUADOR. A NUMBER OF OTHER COUNTRIES HAVE INDICATED CONSIDERABLE SYMPATHY FOR US INITIATIVE AND CAN BE EXPECTED TO SUPPORT, E.G., GREECE, ARGENTINA, VENEZUELA, JORDAN, ZAIRE, TOGO, PAKISTAN, IRAN AND YUGOSLAVIA. KISSINGER

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